Appeal Nos. 2011AP2424-CR
2012AP918

Cir. Ct. Nos. 2009CF189
2006CF446

WISCONSIN COURT OF APPEALS
DISTRICT II

APPEAL NO. 2011AP2424-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NANCY J. PINNO,

DEFENDANT-APPELLANT.

FILED

DEC 05, 2012

Diane M. Fremgen
Clerk of Supreme Court

APPEAL NO. 2012AP918

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRAVIS J. SEATON,

DEFENDANT-APPELLANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Brown, C.J., Reilly and Gundrum, JJ.

Pursuant to WIS. STAT. RULE 809.61, these appeals are certified to the Wisconsin Supreme Court for its review and determination.

ISSUE

Is the failure to object to the closure of a public trial to be analyzed upon appellate review under the "forfeiture standard" or the "waiver standard"?

FACTS

In each of these consolidated cases, the circuit court removed the public from the courtroom during jury selection without complying with the four-part ***Waller***[1] test. In ***State v. Pinno***, the circuit court stated at the outset of the trial: "Other than the jury, nobody will be in the courtroom.… I want no one else in here during the entire voir dire process until the jury is selected.… I want no press in here either." Nancy Pinno's trial counsel did not object to the closure. Pinno filed a postconviction motion for a new trial on the grounds that her constitutional right to a public trial was violated by the court's exclusion of the public during jury selection. The circuit court denied the motion after an evidentiary hearing, concluding that any error was harmless.

In ***State v. Seaton***, the same circuit court judge also excluded the public from the courtroom during jury selection, stating: "If it becomes necessary … I'm just going to excuse everybody in the courtroom, that's the way it's going

[1] ***Waller v. Georgia***, 467 U.S. 39 (1984). Under this test,

> the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

Id. at 48.

to be." Travis Seaton's trial counsel did not object to the closure. Seaton filed a postconviction motion for a new trial on the grounds that his constitutional right to a public trial was violated by the court's exclusion of the public during jury selection. The circuit court denied a request for an evidentiary hearing on the motion as well as a request for the substitution of another judge to hear the motion. The court then concluded that the right to a public trial is not absolute and that any violation was trivial.

DISCUSSION

The Sixth Amendment guarantees a criminal defendant the right to a "public trial." This right applies to state court proceedings via the Fourteenth Amendment's protections of a defendant's right to due process. *See* ***In re Oliver***, 333 U.S. 257, 272-73 (1948). A public trial is a fundamental constitutional right. *See* ***Arizona v. Fulminante***, 499 U.S. 279, 309-10 (1991). The core values of the right to a public trial are: "'(1) to ensure a fair trial, (2) to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, (3) to encourage witnesses to come forward, and (4) to discourage perjury.'" ***United States v. Ivester***, 316 F.3d 955, 960 (9th Cir. 2003) (quoting ***Peterson v. Williams***, 85 F.3d 39, 43 (2d Cir. 1996)). The right to a public trial extends to voir dire. ***Presley v. Georgia***, 558 U.S. ___, 130 S. Ct. 721, 724 (2010). "The process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." ***Press-Enterprise Co. v. Superior Court***, 464 U.S. 501, 505 (1984).

Two exceptions excuse the closure of a public trial from being a constitutional violation. ***State v. Vanness***, 2007 WI App 195, ¶9, 304 Wis. 2d 692, 738 N.W.2d 154. The first is where the court complies with the four-part test

set forth in ***Waller***.[2] ***Vanness***, 304 Wis. 2d 692, ¶9. The second exception is where an unjustified closure (i.e., one that does not meet the ***Waller*** test) is trivial. *See* ***Vanness***, 304 Wis. 2d 692, ¶9; *see also* ***Braun v. Powell***, 227 F.3d 908, 919-20 (7th Cir. 2000); ***Peterson***, 85 F.3d at 42. A closure is trivial if it does not violate the core values of the Sixth Amendment. ***Peterson***, 85 F.3d at 42-43. The closure of a trial that is unjustified and not trivial is considered a structural constitutional error subject to automatic reversal. *See* ***State v. Ford***, 2007 WI 138, ¶43 & n.4, 306 Wis. 2d 1, 742 N.W.2d 61 (citing ***Johnson v. United States***, 520 U.S. 461, 468 (1997)).

In ***State v. Ndina***, 2009 WI 21, 315 Wis. 2d 653, 761 N.W.2d 612, the court left unanswered the question of whether the failure to object at trial to a Sixth Amendment public-trial violation should be analyzed on appeal as a "forfeiture" or "waiver" of the issue. ***Id.***, ¶38. The ***Ndina*** court acknowledged that the case law is divided over whether a "forfeiture" or "waiver" standard applies to trial closures. ***Id.***, ¶35 & nn.9-10. "'Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.'" ***Id.***, ¶29 (quoting ***United States v. Olano***, 507 U.S. 725, 733 (1993)). The court characterized these as two "very different legal concepts." ***Ndina***, 315 Wis. 2d 653, ¶29.

Other jurisdictions are divided over whether a defendant's failure to timely object to a trial closure should be considered forfeiture or waiver of the error. ***Id.***, ¶35 & nn.9-10. Although a majority of outside jurisdictions appear to

[2] We also have referred to this test as the ***Press-Enterprise*** test in recognition of its introduction in ***Press-Enterprise Co. v. Superior Court***, 464 U.S. 501 (1984). *See* ***State v. Vanness***, 2007 WI App 195, ¶9 & n.3, 304 Wis. 2d 692, 738 N.W.2d 154.

consider the right forfeited upon failure to object, some of these jurisdictions also have different protections that allow a defendant to raise the error on appeal. *See, e.g.,* ***Robinson v. State***, 976 A.2d 1072, 1080 (Md. 2009) (evaluating whether rejecting request to review unpreserved claim of error would prejudice the parties or promote the orderly administration of justice); ***People v. Vaughn***, 821 N.W.2d 288, 303 (Mich. 2012) (reviewing forfeited constitutional right to public trial for "plain error"). Courts that have found that the right can be forfeited have reasoned that the right to public trial, unlike rights that require waiver or that cannot be waived, does not affect the quality of the guilt-determining process, ***State v. Butterfield***, 784 P.2d 153, 156 (Utah 1989), or implicate other constitutional rights, ***Vaughn***, 821 N.W.2d at 298. On the other hand, the Seventh Circuit determined that the right to public trial requires waiver as it "concerns the right to a fair trial" similar to other constitutional rights requiring an affirmative waiver. ***Walton v. Briley***, 361 F.3d 431, 433-34 (7th Cir. 2004).

Pinno and Seaton argue that, as the right to public trial is a structural constitutional right, it can only be waived through an intentional relinquishment of the right. The State argues that the forfeiture rule should apply because an objection at trial would allow the circuit court to take corrective action and avoid appellate review.

The general rule is that a forfeited right will not be reviewed by an appellate court. *See* ***Ndina***, 315 Wis. 2d 653, ¶30. This rule extends to some alleged constitutional errors. *See, e.g.*, ***State v. Huebner***, 2000 WI 59, ¶¶10, 26, 235 Wis. 2d 486, 611 N.W.2d 727 (right to a twelve-person jury); ***State v. Davis***, 199 Wis. 2d 513, 517, 545 N.W.2d 244 (Ct. App. 1996) (right to be free from unreasonable searches); ***State v. Edelburg***, 129 Wis. 2d 394, 400-01, 384 N.W.2d 724 (Ct. App. 1986) (right to untainted jury deliberations). Forfeited rights may

still be reviewed on appeal, however, under an ineffective-assistance-of-counsel standard, i.e., for counsel's deficient performance and prejudice to the defendant. *See* ***State v. Beauchamp***, 2011 WI 27, ¶¶14-15, 333 Wis. 2d 1, 796 N.W.2d 780.

Other rights are subject to waiver, meaning that they are "not lost unless the defendant knowingly relinquishes the right." ***Ndina***, 315 Wis. 2d 653, ¶31. Rights lost only by waiver are "so important to the administration of a fair trial that mere inaction on the part of a litigant is not sufficient to demonstrate that the party intended to forego the right." ***State v. Soto***, 2012 WI 93, ¶37, 343 Wis. 2d 43, 817 N.W.2d 848. "Therefore, when determining whether a right is subject to forfeiture or waiver, we look to the constitutional or statutory importance of the right, balanced against the procedural efficiency in requiring immediate final determination of the right." ***Id.***, ¶38. A right that is "particularly important to the actual or perceived fairness of the criminal proceedings" may be relinquished only by waiver. ***Id.***, ¶40. The right to trial by jury, the right to counsel, the right to refrain from self-incrimination, and the right to be present in the same courtroom as the presiding judge are rights that Wisconsin courts have identified can only be waived knowingly. ***Id.***, ¶¶37, 40. A valid waiver of a right also precludes appellate review, although a defendant may attempt to invalidate a waiver on appeal by arguing that the waiver was not made knowingly, voluntarily, or intelligently. *See* ***id.***, ¶45.

From the foregoing discussion it appears clear that an unobjected-to trial closure might constitute (1) a forfeited error that is reviewed under the ineffective-assistance-of-counsel standard, or (2) a waivable error that is initially reviewed for whether the right to public trial was knowingly relinquished before considering whether a constitutional violation occurred. Resolution of which path to follow will likely be dictated by the court's determination of whether the right

to a public trial is a right that is "particularly important to the actual or perceived fairness" of a criminal proceeding. *See* ***id.***, ¶40.

We also have an additional concern not raised by the parties. The public has a constitutional interest in public trials. The openness of trial proceedings, including the process of jury selection, is important not only to adversaries in the immediate proceedings but to the entire criminal justice system. ***Press-Enterprise***, 464 U.S. at 505. The public has an interest in openness to ensure that justice is not being horse-traded or performed by a Star Chamber.

CONCLUSION

A defendant's Sixth Amendment right to a public trial is fundamental, yet not absolute. Under certain conditions, a trial closure will not violate this important constitutional right. Clear direction on how reviewing courts should evaluate claims of a constitutional violation of the right to a public trial is important to our administration of justice. We respectfully request the Wisconsin Supreme Court to grant certification and provide guidance to our courts.